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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1039

XENO W. PUTNAM AND BESSIE L. PUTNAM
Petitioners,

vs.

THE FEDERAL LAND BANK OF BALTIMORE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLARENCE A. PATTERSON,
FLORENCE LAYNOR WHEATLEY,
JOHN L. BITNER,
The Federal Land Bank of Baltimore,
24th and St. Paul Streets,
Baltimore, Maryland,
FRANK D. PRATHER,
Meadville, Pennsylvania,
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md.

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I.

THE OPINION BELOW.

The petition for a writ of certiorari filed by the petitioners is for a review of a decision of the Supreme Court of Pennsylvania, cited as Federal Land Bank of Baltimore vs. Putnam, and reported in 350 Pa. 533; 39 A. (2d) 586.

II.

STATEMENTS PERTAINING TO JURISDICTION OF THIS COURT.

Petitioners filed their petition for a writ of certiorari in the Supreme Court of the United States on the 13th day of March, 1945. On March 23, 1945, respondent was furnishd

with a notice of the filing of the petition but the notice was not accompanied by a copy of the petition and brief as required by Rule 38 of this Court and this fact is reflected by respondent's acceptance of the notice as endorsed thereon. A copy of the petition and brief were first received by respondent on March 30, 1945. By reason of petitioners' failure to comply with said Rule 38, they have forfeited any right to have their petition considered by this Court.

Petitioners have stated that the jurisdiction of this Court is invoked on the authority of Sec. 237 (b) of the Judicial Code; 28 U. S. C. 344 (b). The petition and brief indicate that this section of the law is invoked to sustain the jurisdiction of this Court upon the theory that by the decision of the Supreme Court of Pennsylvania there is drawn in question the validity of Sec. 75 of the Bankruptcy Act, (n) (o) (p), 11 U. S. C. 203 (n) (o) (p). The validity of the cited sections of the Bankruptcy law were, at no time, in issue in the course of any of the proceedings upon which the decision of the Supreme Court of Pennsylvania was based. The issue before the Court was primarily an issue of fact and the question involved was whether there were pending any bankruptcy proceedings on behalf of the petitioner, Bessie Putnam, at the time the trial Court decided upon the question of its own jurisdiction to make sale of the mortgaged property and confirmed the sale. Upon the basis of the record, the Supreme Court of Pennsylvania found that the petition in bankruptcy filed by Bessie Putnam had been dismissed and was not pending at the time of the entry by the Trial Court of the order in question (R-56a). Having thus determined the factual question, the Supreme Court further determined that the order of the Trial Court confirming sale of the mortgaged property was fully effective to divest Bessie Putnam of all her right, title and interest in the property and that she had

no interest to which the jurisdiction of the Federal Court could attach through a subsequent unsuccessful effort on her part to reinstate the bankruptcy proceedings. The statute upon which the petitioners rely for the purpose of invoking the jurisdiction of this Court has no application to this case.

III.

STATEMENT OF THE CASE.

The statement of the case as it appears in the brief filed on behalf of the petitioners, pages 13 to 15, proceeds upon the theory that the Trial Court was divested of its jurisdiction in foreclosure proceedings on September 10, 1936, when Bessie Putnam filed a petition under the Frazier-Lemke Amendment to the Bankruptcy Act (Sec. 75), and that because of continued pendency of the bankruptcy proceedings, the Trial Court did not, at any time, become revested with jurisdiction over said petitioner or her property. In support of this theory the petitioners rely upon certain certificates of the Clerk of the United States District Court, described as Exhibit "A" (R-91-a), Exhibit "B" (R-16-a and R-92-a) and Exhibit "C" (R-92-a). The trial Court, however, deemed this evidence insufficient to establish pendency of the bankruptcy proceedings as it had before it and relied upon the following:

1. The reported decision of the United States District Court "In re: Bessie Putnam" (27 Fed. Supp. 812), where it appears that the petition dated September 10, 1936, was determined by the Federal Court to be without merit and was dismissed on August 5, 1937. (R 42a and 43a—Exhibit "D").

2. The order of the United States District Court dated July 9, 1940, dismissing a further petition filed by Bessie Putnam on August 23, 1939, under Section 75 (s) of the Bankruptcy Act (R-50a).

The following is a chronological statement of the major events leading to the judgment on which the petition for a writ of certiorari has been filed:

March 19, 1935—Writ of sci. fa. sur mortgage issued (R-1a).

April 6, 1935—Judgment taken against petitioners (R-1a).

September 10, 1936—Petition filed by Bessie Putnam under Sec. 75 of the Bankruptcy Act (R-16a and 92a).

August 5, 1937—Bessie Putnam's petition dismissed by United States District Court (R-42a and 43a—Exhibit "D").

February 10, 1938—Petition of Bessie Putnam to vacate order of August 5, 1937, refused (R-44a—Exhibit "F").

October 19, 1938—Bessie Putnam's appeal to United States Circuit Court of Appeals dismissed (R-47a—Exhibit "I").

September 15, 1939—Sheriff's sale (Referred to in order of Court R-52a).

July 9, 1940—Petition of Bessie Putnam for appraisal refused and denied by United States District Court (R-50a).

July 23, 1940—Motion of petitioners in the form of exceptions to sheriff's sale dismissed and sheriff directed to deliver deed (R-56a).

September 5, 1940—Petition in Trial Court to declare foreclosure proceedings void and to refuse confirmation of deed (R-62a).

May 5, 1941—Petition to declare foreclosure proceedings void dismissed and rule to show cause discharged (R-72a).

September 28, 1942—Citation awarded upon respondent's petition for possession of real estate (R-76a).

November 8, 1943—Order granting possession (R-104a).

November 26, 1943—Notice of appeal of petitioners to Supreme Court of Pennsylvania (R-107a).

The foregoing calendar indicates that a petition filed by Bessie Putnam under Section 75 of the Bankruptcy Act was dismissed on August 5, 1937, and that her petition for vacation of the order of August 5, 1937, was refused on February 10, 1938. An examination of the record further shows that a petition of Bessie Putnam filed on August 23, 1939, for an appraisal of her property under Section 75, subsection (s), of the Bankruptcy Act was refused by an order of the District Court entered July 9, 1940 (R-50a) upon the ground that her right to an appraisal had been determined and was res adjudicata by virtue of the order entered on February 10, 1938. The record establishes that no proceedings in bankruptcy effective to oust the jurisdiction of the Trial Court were pending at any time subsequent to February 10, 1938, so that the Trial Court was vested with sole jurisdiction of both of the petitioners and their property on the date of sale and on the date of confirmation.

IV.

SUMMARY OF THE ARGUMENT.

Where no bankruptcy proceedings are pending at a time when a State Court dismisses exceptions questioning jurisdiction of the State Court to hold a sheriff's sale, and no appeal is taken, the jurisdictional question becomes res adjudicata and no federal question may be invoked on such a record.

V.

ARGUMENT.

The argument of the petitioners is that the filing of a petition in bankruptcy subjects a bankrupt and all his property to the exclusive jurisdiction of the United States Court in which the petition is filed, and as a corollary of this proposition, a State Court can have no jurisdiction of the person or property while the bankruptcy proceedings are pending. The theory advanced is uncontroverted and it is undisputed that Sec. 75 of the Bankruptcy Act, 11 U. S. C. 203 is the supreme law of the land by virtue of Article I, Sec. 8, Clause 4 of the Constitution, and by virtue of Article VI, Clauses 2 and 3 of the Constitution, but the theory has no application to this case.

The argument of the petitioners completely ignores the fact that no proceedings in bankruptcy were pending when the trial Court entered its order of July 23, 1940, (R-56a) denying their petition in the nature of exceptions to the sheriff's sale. On that date the Trial Court had jurisdiction of Bessie Putnam and her property and by its order she was divested of any and all interest which she had in the property, and thereafter she had no interest which could be subjected to the jurisdiction of the Bankruptcy Court. The existence of this fact renders all of the argument made on behalf of the petitioners and the authorities cited in support thereof wholly inapplicable to this case.

A. The bankruptcy proceedings relied upon by the petitioners had been dismissed by the Federal Court approximately five years before possession proceedings were filed in the Trial Court.

The defense alleged in the answer in the possession proceedings (R-77a) and which the Trial Court found to be insufficient as a matter of law, consists basically of an alle-

gation that on September 10, 1936, Bessie Putnam filed a petition under Section 75 of the Bankruptcy Act and an allegation that on July 2, 1942, and on October 14, 1942, Bessie Putnam was informed by the Clerk of the Federal Court at Pittsburgh that the case was still pending on the docket. The answer filed does not allege that any other petitions were filed by Bessie Putnam with respect to these bankruptcy proceedings subsequent to 1936. In considering the sufficiency of the answer the Trial Court had before it not only the answer itself but also the reported decision of the United States District Court involving the bankruptcy proceedings referred to in the answer. Reference to this reported decision (27 Fed. Supp. 812) will reveal that the petition filed by Bessie Putnam on September 10, 1936, was dismissed on August 5, 1937, and that subsequently, to wit: on February 10, 1938, the United States District Court (Gibson, J.) denied a petition filed by Bessie Putnam to vacate the order of dismissal. An appeal was taken by Bessie Putnam to the Circuit Court of Appeals and was dismissed for lack of prosecution. (R-47a—Exhibit "I"). In the face of this final adjudication that the petition referred to in the answer was without merit, it was not error for the Trial Court to reject the allegation of the pleading that the petition remained undisposed of on July 2, 1942, and October 14, 1942, and it was not error for the Trial Court to reject the inference from this allegation that the petition filed in 1936 was pending in the Federal Court on the day of the Sheriff's sale and on the day exceptions to the Sheriff's sale were dismissed. It is incontrovertible that the petition of 1936 had been dismissed for approximately five years prior to the filing of the answer. It was not pending in the Federal Court either on the day of the Sheriff's sale or on the day exceptions to the Sheriff's sale were dismissed.

In deciding this case the Trial Court gave to the petitioners the full advantage of its knowledge, aliunde the proceedings, of the status of proceedings which had been instituted in the Federal Court. Through its knowledge of prior proceedings before it, the Trial Court gave full consideration to the legal effect of the fact that on August 23, 1939, Bessie Putnam had filed in the Federal Court a further petition to be adjudged bankrupt under Section 75(s). (The Trial Court previously had before it the petition of Bessie Putnam to set aside the sheriff's sale and enjoin the execution of the deed upon the allegation that the further bankruptcy petition of August 23, 1939, had been filed in the Federal Court.) (R-31a). In these prior proceedings and in considering the rights of Bessie Putnam in the possession proceedings, the Trial Court also had before it the order entered by the United States District Court on July 9, 1940, dismissing the petition filed by Bessie Putnam on August 23, 1939. (R-50a). In its opinion (R-98a) accompanying the order from which an appeal was taken the Trial Court made reference to its knowledge that the petition had been filed and dismissed even though the answer filed failed to make any reference thereto. Thus, in considering the case the Trial Court gave to the Putnams the full advantage of its knowledge of the history of this case in the Federal Court notwithstanding their failure to allege such matters in their answer. The Trial Court treated the answer as if it had alleged that the petition of August 23, 1939, had been filed in the Federal Court. The Trial Court said:

> "The Order very clearly shows that all proceedings in the said Court (District Court) are now dismissed and the petition of Bessie L. Putnam, Debtor, is refused and denied. With the entry of the order, there is nothing now pending in the United States District Court which could affect the action of this court on the

pending motion and rule. Under such existing circumstances, why should additional and useless costs be incurred in the instant proceeding? The Sheriff's sale was legally carried to the point it was stayed. To carry the stay further would be but unreasonable delay and in all probability of no avail to defendants. Such delay might work undue hardship and loss upon plaintiff. We can but conclude that the motion must be dismissed and the rule discharged." (R-55a)

B. The issue of law raised by the petition for a writ of certiorari has previously been determined by the Supreme Court of the United States.

The facts involved in the case of Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 Sup. Ct. 773, cited by the Supreme Court of Pennsylvania, are almost identical with the facts in the instant case, and that decision controls the issues here involved. In the Byerly case, proceedings were instituted by the Union Joint Stock Land Bank for foreclosure of a mortgage executed in its favor by Byerly. Five (5) days prior to the date set for sale of the property, Byerly filed a petition in the United States District Court under Sec. 75 of the Bankruptcy Act and the District Court issued an order restraining further proceedings in the foreclosure suit. This order was subsequently modified by the District Court to permit sale of the premises but to restrain other proceedings, particularly confirmation of sale and execution of a sheriff's deed and thereafter the property was sold. No agreement could be reached by Byerly's creditors in the bankruptcy proceedings and he filed an amended petition to be adjudged a bankrupt under subsection (s) of Sec. 75 of the Bankruptcy Act. Thereafter certain features of subsection (s) were held by this Court to be unconstitutional, and Byerly's petition and amended petition were dismissed.

The sale of the property in the foreclosure suit was then confirmed by the State Court and a sheriff's deed was delivered and recorded. After confirmation of the sale by the State Court, Byerly moved for reinstatement of his bankruptcy case in the District Court and the motion was granted. The District Court, on motion of the Union Joint Stock Land Bank entered an order disclaiming the real estate. Byerly appealed from the order and the matter ultimately reached this Court under a writ of certiorari.

The Union Joint Stock Land Bank asserted, First: That Byerly's remedy was to appeal from the order of the District Court which authorized the State Court to sell the mortgaged premises and that, since Byerly had not availed himself of this remedy, the judgment of the District Court was res adjudicata and not subject to collateral attack. Second: That, although the State Court was without jurisdiction while the original bankruptcy proceedings were pending, it regained jurisdiction by the termination of the bankruptcy case and had exclusive jurisdiction of the parties and the subject matter when the decree of confirmation was entered and that the decree of confirmation, therefore, could not be collaterally attacked in the United States District Court or elsewhere. The Supreme Court of the United States in sustaining these views reversed an order of the Circuit Court of Appeals, and in the opinion of this Court Mr. Justice Roberts said:

> "Second. The termination of the bankruptcy proceeding restored the jurisdiction and power of the State court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court. * * *
>
> Although the State court's jurisdiction was *superseded* by that of the bankruptcy court, *it again attached* upon the dismissal of the bankruptcy case, and,

> thenceforward, as respects the foreclosure suit, and the State court's procedure, it was as if no bankruptcy case had ever existed. With jurisdiction of the parties and the subject matter, the State court entered a decree confirming the sale and authorizing a deed, the sheriff executed his deed, which was duly recorded, and the petitioner went into possession as purchaser of the mortgaged premises. Thereafter the respondent moved for reinstatement of the bankruptcy case and his motion was granted. In the interim, no bankruptcy cause was pending and the State court had jurisdiction to proceed as it did." (Italics supplied.) (p. 777.)

The fact which controlled the decision of this Court in the Byerly case was that the State Court confirmed the sale at a time when no bankruptcy proceedings were pending and when the State Court was unquestionably vested with sole and exclusive jurisdiction over the persons and the subject matter. There was no conflict of jurisdiction.

An analogous situation exists in the instant case. Subsequent to the date of sale the Putnams filed a petition in the Trial Court to have the sheriff's sale set aside and to enjoin the execution of deed. This petition was in the nature of exceptions to the sale. The petition of August 23, 1939, which Bessie Putnam filed under Section 75 of the Bankruptcy Act, was dismissed by the United States District Court on July 9, 1940, upon the ground that the subject of the petition was res adjudicata under an order of the same court entered on February 10, 1938. On July 23, 1940, at a time when no bankruptcy proceedings were pending and when the Trial Court was unquestionably vested with the sole and exclusive jurisdiction of the persons and the subject matter, the Court entered an order sustaining its jurisdiction to make sale of the property and denying the petition that the sale be set aside. No appeal was taken. In the light of the similar factual sit-

uations, the principles enunciated by this Court in the Byerly case are wholly applicable to and controlling on the points involved in this controversy.

The decision in the Byerly case was followed and relied upon in the case of Wheat vs. Texas Land and Mortgage Co., Ltd., et al., 163 S. W. (2d) 880-885, involving similar facts. A writ of certiorari was denied by the Supreme Court of the United States in that case (319 U. S. 751; 63 S. Ct. 1162), and a petition for a rehearing was also denied (319 U. S. 785; 63 S. Ct. 1431).

C. No Federal Question is Involved.

In the light of the decision of this Court in the Byerly case, it is apparent that if Bessie Putnam had pending no proceedings in bankruptcy on July 23, 1940, the date on which the Trial Court entered an order denying the petition to set aside the foreclosure sale and to enjoin execution of deed, this case involves no federal question. A reversal of the decision of the Trial Court as affirmed by the Supreme Court of Pennsylvania would not subject the property involved to the jurisdiction of any Federal Court but would serve merely to restore the property to the Putnams unaffected by any legal proceedings. The petitioners attempt to support the assertion that bankruptcy proceedings were pending upon the basis of the certificates of the Clerk of the United States District Court, marked Exhibits A, B and C. (R-91a, 16a and 92a). The decision of the Trial Court sustained by the Supreme Court of Pennsylvania rejected this evidence and relied upon the reported decisions covering the proceedings in the District Court with respect to the petition of Bessie Putnam filed on September 10, 1936, to which reference has been specifically made in this brief.

The Supreme Court of Pennsylvania concluded on the basis of the record that no bankruptcy proceedings were pending on July 23, 1940, and that hence there existed no question with respect to the Trial Court's jurisdiction on that date to enter the order which in effect confirmed the foreclosure sale, since on that date the Trial Court was the only Court which had any jurisdiction in the premises.

Whether the question presented by the petition in the Trial Court to set aside the foreclosure sale was res adjudicata presents no federal question, since there existed no conflict of jurisdiction between the Federal and State Courts on the date on which the Trial Court entered its order. Under such circumstances, whether the Trial Court was correct in its conclusion is subject to review only by the Supreme Court of Pennsylvania.

D. The Record will justify the Conclusion by the Court that this petition for certiorari was filed for the purpose of delay.

This case reaches this Court against a background which is significant. The Respondent has been seeking to liquidate this loan for nine years. At the time foreclosure proceedings were commenced in 1935 the mortgagors, who are the petitioners in this cause, had defaulted in the payment of four semi-annual instalments and had neglected to pay the taxes assessed against the mortgaged premises for 1931 and subsequent years. At that time the balance due on the mortgage was $5,549.66. Since the proceedings were commenced taxes and interest for nine additional years have accrued and are a charge against the loan. The total debt represented by the security involved in this case is now almost $11,000.00, no part of which has been paid. The mortgagors have been in possession of the property continuously and are still in possession.

In the reported opinions of the Federal Court in this case this background is summarized as follows:

> "The Commissioner reported that the debtor had not farmed over an acre of land for over fifteen years; that he had no assets other than personal property of a nominal value; that he had no present income other than small sums received for magazine articles; that he had no livestock on the farm; that taxes had not been paid on the property for six years, and that the debtor had failed to show any feasible plan whereby his debts could be paid if an extension were allowed." (In re: Putnam, 27 Fed. Supp. 812).

and

> "The debtor himself testified he has not been running the farm for profit, that he makes a small garden for his own use. The former reports of Conciliation Commissioners find that not over an acre had been plowed for fifteen years; about eight years' taxes and delinquent interest exist; the debtor has no income, no stock, no equipment, except a tractor bought in 1920". (In re: Putnam, 27 Fed. Supp. 813).

In its opinion of May 5, 1941, the Trial Court said:

> "In the instant case, defendant and her co-title holder have for divers reasons advanced stayed the proceedings for a period in excess of five years, during which time the farm has not been operated. In consequence of which the improvements have fallen into a poor state of repair—no payments, principal or interest, have been made upon the undenied indebtedness and taxes have been allowed to go unpaid and accumulate." (R-71a).

The petitioners have remained in possession of the property involved for a period of nine years through the device of filing successive petitions in the State and Federal Courts. They have filed numerous petitions in the Fed-

eral Court and five separate petitions in the Trial Court. The several petitions in the Federal Court all involved vain attempts to bring themselves within the scope of Section 75 of the Bankruptcy Act and all these petitions were dismissed by the Federal Court. (In re: Putnam, 27 Fed. Supp. 812-813). Instead of appealing from adverse decisions they continued to file successive petitions in utter disregard of prior adjudications. This same technique was employed in the Trial Court. As previously noted, the petition to enjoin the delivery of the sheriff's deed—the petition to declare the foreclosure proceedings void, and the answer in the possession proceedings—each raise exactly the same question of jurisdiction. On this phase of the case the Trial Court said:

> "The record discloses that during the past several years defendants, on at least five different occasions, have raised issues for consideration of the Court involving jurisdiction of the Court, validity of the Sheriff's sale, etc., all of which have been decided against defendants, in written Opinions filed of record as evidenced by the following Orders, and to which no objections have been made or appeals taken, all of which we believe will be self-explanatory." (See Opinion of Nov. 8, 1943.) (R-96a).

The complete absence of merit in all of these petitions justifies the conclusion that the several proceedings were designed to produce delay and continued possession. This conclusion is wholly consistent with the fact that so long as there is a proceeding pending the petitioners will remain in possession. The right to litigate does not include the abuse of legal process. The pattern formed by the record is such that this Court can properly find that the petition for the writ of certiorari was filed for the purpose of delay.

CONCLUSION.

1. Petitioners have forfeited the right to a consideration of their petition for a writ of certiorari by reason of their failure to comply with Rule 38.

2. No bankruptcy proceedings were pending on the date on which the Trial Court entered an order which constituted a confirmation of a sale of property in foreclosure proceedings and on that date there existed no conflict of jurisdiction between the Federal and State Courts. Thereafter, the petitioners had no interest in the property which could be subjected to the jurisdiction of the Federal Courts in proceedings under Section 75 of the Bankruptcy Act and it follows that no federal question is involved in this matter.

3. The issue of law raised by the petition has previously been decided by the Supreme Court of the United States in Union Joint Stock Land Bank v. Byerly, supra.

4. There is ample evidence on the record to support the conclusion that the petition is intended for delay.

Respectfully submitted,

CLARENCE A. PATTERSON,

FLORENCE LAYNOR WHEATLEY,

JOHN L. BITNER,

FRANK D. PRATHER,

Attorneys for Respondent.